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No. 76-1677

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, ET AL.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and the
UNITED STATES OF AMERICA, ET AL., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY OF PETITIONERS

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REPLY OF PETITIONERS

Petitioners submit this reply in response to the opposition to certiorari filed by respondent-intervenors ("ARINC Br."). The intervenors' opposition offers no persuasive reason for denying certiorari. On the contrary, their arguments confirm that this case presents questions of extreme importance and involves direct conflicts with decisions of this Court and other federal courts.

I. The FCC's Jurisdictional Claim Poses a Recurring Issue of Extreme Importance Which Was Erroneously Resolved by the Court Below.

In urging review of the FCC's jurisdictional claim, petitioners showed that the registration program will affect millions of pieces of terminal equipment (Pet. 21); that it threatens to cost the public hundreds of millions of dollars in less than a decade (Pet. 10); and that it will drastically alter the way in which telephone service has long been provided in this country (Pet. 21). Without directly contesting these facts, intervenors appear to contend—quite wrongly—that the decision below is sufficiently consistent with the statute and precedent that review is unwarranted despite the importance of the case.

1. Everyone who has seriously addressed the basic jurisdictional issue in this case, including the court below (Pet. App. 11a-16a), has recognized that the central question is the meaning of the Communication Act's limiting proviso: "nothing in this Act" shall give the FCC power over "facilities" which are used "for or in connection with" intrastate or exchange communication. Pet. 17. Yet, the intervenors never even acknowledge this statutory language in their opposition. Instead, in a single footnote, intervenors ignore the statute's words and offer their own characterization which bears no resemblance to what Congress actually said in the Act.

Thus, intervenors baldly assert (ARINC Br. 12 n.2[illegible]) that Section 2(b)(1) "precludes the exercise of FCC jurisdiction only over facilities and services that are technically and practically separable from interstate communications service." But Section 2(b)(1) says no

such thing. It states that "nothing in this Act shall be construed to apply or give the Commission jurisdiction with respect to . . . facilities . . . for or in connection with intrastate communication service . . . ." And Section 221(b) reiterates this prohibition for "facilities" used "for or in connection with . . . telephone exchange service . . . ."

Neither provision contains any indication that Congress intended it to apply only to those facilities, used for intrastate and exchange service, which are "separable from interstate communication service."[1] On the contrary, petitioners have already shown (Pet. 20) that Congress, in enacting the Communications Act, included the limitations on FCC authority for the express purpose of protecting existing state jurisdiction, which had long encompassed facilities used for interstate as well as intrastate and exchange communications (Pet. 5-6, 22-23 & n.34), "against being overridden by [the FCC]."[2]

Intervenors do not deny that the registration orders assert "jurisdiction" over and seek to "apply" the Act

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[1] Indeed, there are practically no significant "facilities" that would meet intervenors' test. One of the anomalies of the lower court's opinion is that it renders the "facilities" reservation almost meaningless, in direct violation of the principle that a statute should be "construe[d] . . . so as to give effect to all of its terms." *Donaldson, Hoffman & Goldstein* v. *Gaudio*, 260 F.2d 333, 336 (10th Cir. 1958). See also *United States* v. *Menasche*, 348 U.S. 528, 538-39 (1955).

[2] *Hearings on S. 2910 Before the Senate Comm. on Interstate Commerce*, 73d Cong., 2d Sess. 179 (1934). It was well known prior to the Act that exchange facilities—although predominantly used for intrastate and exchange service—handled interstate calls as well. See Pet. 5; *Smith* v. *Illinois Bell Tel. Co.*, 282 U.S. 133, 146-47 (1930).

to "facilities" (specifically, terminal equipment) used "for and in connection with" both "intrastate" and "exchange" service. Consequently, there exists a direct conflict between the express terms of Sections 2(b)(1) and 221(b) and the FCC's registration orders.[3] Unable to offer any way to resolve this conflict, the intervenors' response is simply to ignore it, apparently in the hope that the Court will do likewise. However, the conflict cannot be ignored if the jurisdictional limits expressly established by Congress are to be preserved; and to preserve those limits, review by this Court is essential.

2. In opposing review of the jurisdictional issue, intervenors rely primarily on the claim that several Circuits have sustained the FCC's authority to regulate terminal equipment and other facilities even though such facilities may be used for intrastate and exchange service as well as interstate service. ARINC Br. 8-9. They imply that there is general harmony among the Circuits on the jurisdictional issue and confidence that the issue is readily resolved. A very different conclusion emerges upon examining the views of the three Circuits that have considered the issue:

a. *Fourth Circuit.*—The Fourth Circuit has addressed the jurisdictional issue in the decision below and in *North Carolina I.*[4] Both decisions were rendered by

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[3] Within this context, intervenors' reliance (ARINC Br. 12) on the FCC's supposedly "broad authority" simply begs the legal question to be answered. Whatever authority the FCC otherwise has over telecommunications under Title II of the Communications Act, such authority is necessarily qualified by the jurisdictional limitations expressly imposed in Sections 2(b)(1) and 221(b). Congress could not have chosen clearer language—"nothing in this Act"—to make plain its intent that Sections 2(b)(1) and 221(b) override and delimit any other grant of authority contained in the Act, however "broad" such grant might be said to be.

[4] *North Carolina Utilities Comm'n* v. *FCC*, 537 F.2d 787 (1976), *cert. denied*, 45 U.S.L.W. 3432 (U.S. Dec. 13, 1976).

divided panels with vigorous dissents; neither decision was subject to en banc consideration because of disqualifications in the Circuit. The extent of that court's confidence in its resolution of the jurisdictional issue is demonstrated by the fact that it felt impelled to reconsider the jurisdictional issue fully in the present case and to provide an analysis differing from that offered less than a year before in *North Carolina I*.

b. *District of Columbia Circuit.*—In *California* v. *FCC*, No. 75-2060 (D.C. Cir., filed June 20, 1977), the District of Columbia Circuit rejected the argument that Sections 2(b)(1) and 221(b) barred FCC regulation of a particular type of intrastate service. The decision was rendered in a brief per curiam opinion over a painstaking dissent by Judge Robinson who made clear that, in his view, Congress had adopted Section 2(b)(1) specifically in order "to 'reserve[] to the states exclusive jurisdiction over intrastate telephone and telegraph communications' . . . ." Slip Op. at 4.

Nevertheless, intervenors claim the *California* per curiam clearly signals that the District of Columbia Circuit has "joined" the Fourth Circuit in affirming the FCC's authority over terminal equipment used "for or in connection with" intrastate and exchange service. ARINC Br. 9. But the intervenors neglect to note that the District of Columbia Circuit has rendered another decision on the jurisdictional issue which is at odds with the *California* per curiam and which is even more clearly on point since, like the present case, it involved "facilities" rather than "services."

In *Kitchen* v. *FCC*, 464 F.2d 801 (1972), the Circuit squarely rejected the claim that the FCC had authority to regulate a telephone exchange facility even though

the facility—like terminal equipment—allegedly would handle some interstate as well as exchange communications. The Circuit ruled that Section 221(b) expressly "precluded" an exercise of federal jurisdiction over the facility, even assuming the facility were otherwise within the FCC's authority under other provisions of Title II. *Id.* at 803. The *Kitchen* decision, which the *California* per curiam does not even cite, belies any suggestion that the District of Columbia Circuit has unequivocally accepted FCC primacy over facilities used both for interstate and for intrastate and exchange service.

c. *First Circuit.*—Recently, in *Puerto Rico Telephone Co.* v. *FCC,* 553 F.2d 694 (1977), the First Circuit held that the FCC has jurisdiction over certain facilities used in "intrastate and exchange service." However, in so doing, the court acknowledged that "[r]ead literally, [Sections 2(b)(1) and 221(b)] do appear to preclude" the FCC's exercise of jurisdiction. *Id.* at 698. Against this background, the court itself admitted that the statutory language left its resolution of the jurisdictional issue "far from free of doubt" (*id.* at 699)—an admission hardly suggesting certitude.

In summary, contrary to the intervenors' suggestions, the Circuit courts' decisions reflect a pattern of uncertainty and sharp division which makes clear that the FCC's jurisdictional claim underlying the registration program is neither straightforward nor well settled.[8] Indeed, the decision in *Kitchen* reveals an out-

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[8] The intervenors also imply that review of the jurisdictional issue is inappropriate because certiorari was denied in *North Carolina I.* ARINC Br. 9. However, by now, it is axiomatic that "a denial of a petition for certiorari carries no legal significance."

right conflict not only among the decisions of the District of Columbia Circuit but also with the decisions of the other Circuits, including the decision below. Such a conflict presents the clearest possible case for review by this Court. Sup. Ct. R. 19(1)(b).

The Circuits' decisions also confirm that the jurisdictional issue will be a recurring and time-consuming problem for the lower federal courts. Compare Pet. 23. It is apparent that the FCC is not content to halt its usurpation of areas traditionally regulated by the states: the *California* case demonstrates that the FCC is already moving rapidly to displace existing state jurisdiction in other areas such as intrastate services.[6] Only plenary review by this Court will avoid protracted controversy over the limits imposed on FCC jurisdiction by Sections 2(b)(1) and 221(b).

Furthermore, such review must come now to be fully effective. As the lower court implicitly acknowledged by staying its mandate (Pet. App. 1j-12j), the registration program will involve immediate expenditures and

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Elgin, J. & E. Ry. v. *Gibson*, 355 U.S. 897 (1957) (separate opinion of Frankfurter, J.); *accord, e.g., United States* v. *Carver*, 260 U.S. 482, 490 (1923). Furthermore, as petitioners have shown (Pet. 15-16), the registration program presents a very different and much stronger case for review of the jurisdictional issue than did the abstract declaration of FCC primacy at issue in *North Carolina I*: the registration program is the first occasion on which this Court has been presented with the jurisdictional issue in the context of specific FCC regulatory action whose full implication for long-standing state jurisdiction may now be clearly perceived.

[6] As the petitioners have pointed out (Pet. 24 n.39), the FCC has also begun proceedings which threaten to encroach on state authority over intrastate rates. As a result, intervenors are simply wrong when they imply (ARINC Br. 13 n.32) that the states' long-standing jurisdiction over such rates will remain unimpaired even if the FCC's present jurisdictional claim is allowed to stand.

will be largely irreversible once fully implemented.[7] This, therefore, is the time when the jurisdictional issue should be considered and definitively resolved once and for all.

3. Intervenors assert that the decision below is wholly consistent with "the long-standing pattern of federal and state administrative practice" and the views previously expressed by both the FCC and state agencies regarding the scope of FCC jurisdiction over terminal equipment. ARINC Br. 10-11. Precisely the opposite is true.

Petitioners have clearly shown that it is the state agencies, not the FCC, that regulated virtually every aspect of terminal equipment, including connection of customer equipment, both before and after the enactment of the Communications Act. Pet. 5-9, 22-23. Even the court below acknowledged this fact. Pet. App. 23a. Thus, "the long-standing pattern of federal and state administrative practice" directly contradicts rather than supports the jurisdictional claim underlying the registration program.

Nor is it true—as intervenors claim (ARINC Br. 10)—that the Commission "has consistently rejected" the contention that Sections 2(b)(1) and 221(b) bar FCC regulation of terminal equipment used for intrastate and exchange service. As recently as 1973, the FCC Chairman, in clear recognition of the constraints imposed by Sections 2(b)(1) and 221(b), acknowl-

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[7] The registration program's full implementation will result in the expenditure of millions of dollars on carrier equipment in the first year alone and the attachment to the telephone network of millions of pieces of customer provided equipment. Pet. 24. Once made, the expenditures will be permanently lost and the alterations could never be undone.

edged that the Commission "lack[s] jurisdiction over telephone sets which are a primary part of the facilities used in providing telephone exchange service."[8] Intervenors do not even mention this concession concerning the limits of FCC jurisdiction over the very sort of equipment now sought to be regulated through the registration program.

Instead, intervenors rely essentially on a handful of FCC decisions which preceded the FCC Chairman's statement. None of the decisions involved any claim, much less exercise, of general regulatory authority by the FCC over the vast bulk of terminal equipment used for intrastate as well as interstate service. To the extent FCC jurisdiction over terminal equipment was even considered,[9] several of the decisions involved special situations in which a peculiar interstate nexus existed, as the FCC emphasized at the time by distinguishing the particular equipment involved from ordinary terminal equipment;[10] and, in the remainder, the

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[8] Letter from FCC Chairman, 119 Cong. Rec. 30962 (1973). The determinative influence of Sections 2(b)(1) and 221(b) on the Chairman's observation is apparent from his further explanation that "the Communications Act specifically *excludes* the Federal Communications Commision from any authority with respect to charges, classifications, practices, services, *facilities* or regulations for or in connection with intrastate and exchange telephone service of *any* telephone company." (Emphasis added.)

[9] The decision in *Southwestern Bell Tel. Co.*, 6 F.C.C. 529 (1938), upon which intervenors rely (ARINC Br. 10), involved no question of FCC regulation of terminal equipment; it was concerned with the entirely different matter of transmission facilities found to constitute "part of an interstate line" within the meaning of Section 214(a) of the Communications Act and thus subject to FCC regulation.

[10] See, *e.g.*, *United States Dep't of Defense* v. *General Tel. Co.*, 38 F.C.C.2d 803 (1973), *review denied*, FCC 73-854 (1973), *aff'd*

FCC almost routinely took care to restrict any claim of authority to the equipment's use for "interstate" or "foreign" communication.[11] The general and direct interference with state authority which is patent here was simply never presented in the decisions and thus they are completely consonant with the FCC Chairman's concession.

Finally, it is fanciful to suggest that the state agencies have long recognized FCC primacy over the terminal equipment sought to be regulated under the registration program (ARINC Br. 11). Since the states have for decades generally regulated the provision of terminal equipment, FCC primacy was not even an issue. And it is only through a fine editorial hand that intervenors are able to make the extraordinary and inaccurate suggestion that the California Public Utility

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per curiam sub nom. St. Joseph Tel. & Tel. Co. v. *FCC*, 505 F.2d 476 (D.C. Cir. 1974) (interstate defense facilities which were "different in essential respects" from ordinary telephone sets); *AT&T—TWX*, 38 F.C.C. 1127 (1965) (teletypewriter equipment which was "predominantly interstate in its use" and was not excluded from FCC jurisdiction by Section 221(b) since it did not pertain to "telephone exchange service").

[11] See, *e.g.*, *The Fallon Travelodge*, 14 F.C.C.2d 972, 974 (1968) (FCC jurisdiction held to exist over complaint for damages due to delay in providing certain specialized telephone equipment, but only "to the extent that [the equipment] was provided for use in interstate message telephone service."); *accord*, *e.g.*, *Use of Recording Devices*, 11 F.C.C. 1033, 1047, 1054 (1947); *AT&T—Railroad Interconnection*, 32 F.C.C. 337, 339 (1962). The *Carterfone* decision itself was carefully limited by the Commission to the use of the relevant device "in connection with interstate and foreign ... telephone service," 13 F.C.C.2d at 422; and, contrary to what intervenors imply (ARINC Br. 10), *Carterfone* quite clearly did not establish any general right on the part of customers to connect their own equipment to the network for use in intrastate and exchange as well as interstate service. See pp. 17-18, below.

Commission has "recently . . . acknowledged the need for . . . deference" to FCC jurisdiction over terminal equipment (ARINC BR. 11).[12]

Moreover, the FCC's recent assertion of such authority has been vigorously contested by the states: the National Association of Regulatory Commissioners[13] sought certiorari in *North Carolina I*; the Southeastern Association of Regulatory Commissioners[14] has petitioned for certiorari in both *North Carolina I* and the present case; the regulatory authorities of North Carolina, Ohio, New Mexico and Nebraska either petitioned for certiorari or supported the petitions as amicus curiae in *North Carolina I*; and the regulatory authorities of the first two states have already done the same in the present case. This persistent state opposition to the FCC's belated claim of jurisdiction over terminal equipment confirms the exceptional importance of the jurisdictional issue and the need for plenary review by this Court. *Cf. New York* v. *United States,* 326 U.S. 572, 574 (1946); *Alaska* v. *Arctic Maid,* 366 U.S. 199, 202 (1961).

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[12] The language from the California PUC's decision, quoted by intervenors (ARINC Br. 11), was a description of "[t]he effect" (Slip Op. at 6) of the Fourth Circuit decision now sought to be reviewed and not an endorsement of either the decision or FCC primacy. Indeed, California has only recently argued against FCC preemption in the *California* case (see p. 5, above).

[13] NARUC is a quasi-governmental body representing the public utility authorities in all 50 states. Its status is expressly recognized in the Interstate Commerce Act and the Communications Act, 49 U.S.C. § 305(f); 47 U.S.C. § 410(c).

[14] SEARUC is an association of regulatory commissioners of Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee and Virginia.

II. The FCC Lacks Power to Require Prior Approval of Carrier Equipment and the FCC's Action Is Not Consistent With This Court's RCA Decision.

1. Intervenors do not deny that the registration orders would require carriers for the first time to obtain FCC approval *before* attaching their *own* equipment to their *own* network. Nor do intervenors dispute that the FCC's action represents a novel assertion of power with significant practical consequences for the carriers. In fact, carrier registration will cost the Bell System alone millions of dollars in just the *first year*. Pet. 27.

In opposing review, intervenors attempt to create the impression that petitioners rely merely on the absence of an express grant of such power. ARINC Br. 13-14. Petitioners' argument is, however, very different—namely, that both the legislative plan and the legislative history clearly evidence a congressional intent *not* to confer on the FCC any power to require prior approval of carrier terminal equipment.

Petitioners have shown that Congress carefully articulated in Section 214, 47 U.S.C. § 214, the circumstances in which the FCC would have prior approval power over the facilities of a common carrier subject to regulation under Title II of the Communications Act. Pet. 25. Such prior approval power with respect to terminal equipment is not granted by Section 214 or by another section. Petitioners have also shown that Congress, in considering the Communications Act, considered but ultimately rejected the concept of an FCC prior approval power that would in some instances have embraced carrier terminal equipment. Pet. 26. Considered together, Section 214 and the legislative history negate any claim that Congress granted the FCC the general prior approval power now claimed.

Curiously, intervenors do not even discuss the implications of Section 214 and the legislative history. They offer instead general statements regarding the " 'expansive power' " of the FCC. ARINC Br. 14 (citation omitted). But the bulk of the authority cited for this expansive power are decisions dealing solely with the FCC's power to regulate broadcasting and CATV under Title III of the Act.[15] However, with rare and irrelevant exceptions, terminal equipment does not come within the FCC's Title III powers because it does not transmit radio signals (see Section 301, 47 U.S.C. § 301). As for Title II, it is a precisely articulated statutory plan for carrier regulation [16] which, as the petition showed, does not include the type of authority the FCC now seeks to exercise.[17]

Ultimately, the carrier registration requirement rests on nothing more than "a Commission determination" that it wishes, for the first time since the enactment of the Communications Act some 40 years ago, to exercise "primary responsibility" for the terms and

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[15] ARINC Br. 14, *citing United States* v. *Midwest Video Corp.*, 406 U.S. 649 (1972); *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968); *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943); *Mt. Mansfield Television, Inc.* v. *FCC*, 442 F.2d 470 (2d Cir. 1971).

[16] See *AT&T* v. *FCC*, 487 F.2d 864, 875-76 (2d Cir. 1973). See also *California* v. *FCC*, No. 75-2060 (D.C. Cir., filed June 20, 1977) (Robinson, J., dissenting op. at 5 n.23).

[17] In stressing the FCC's supposedly "expansive powers," the intervenors are able to cite only a single decision dealing with the regulation of common carriers under Title II. ARINC Br. 14 n.34. Even that decision, *GTE Service Corp.* v. *FCC*, 474 F.2d 724 (2d Cir. 1973), involved no question of FCC authority over carrier terminal equipment; it was concerned only with rules designed to regulate the provision of data processing services by common carriers.

conditions on which carrier equipment is attached to the carriers' own network. ARINC Br. 15.[18] However, the FCC, like any administrative agency, is "entirely a creature of Congress and the determinative question is not what [the agency] thinks it should do but what Congress has said it can do." *CAB* v. *Delta Air Lines, Inc.*, 367 U.S. 316, 322 (1961). Certiorari is necessary to ensure that the FCC is restricted to "what Congress has said it can do."

2. Apart from contesting the FCC's claimed power to require prior carrier registration, the petition demonstrated that the basis on which the alleged power was exercised in this case directly conflicts with *FCC* v. *RCA Communications, Inc.*, 346 U.S. 86 (1953), and *Hawaiian Telephone Co.* v. *FCC*, 498 F.2d 771 (D.C. Cir. 1974). The Commission's purpose was simply to equalize competition for its own sake; it made no findings to support the view that such an exercise in handicapping would serve the public interest.

Intervenors do not deny that the FCC, in requiring registration of carrier equipment, was seeking to handicap carriers in order to achieve a supposed competitive balance between carriers and non-carriers as equipment suppliers.[19] In fact, they expressly acknowledge that the carrier registration requirement is based on a Commission determination that carriers should not

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[18] Section 205 of the Act (47 U.S.C. § 205), which the intervenors also cite (ARINC Br. 15 n.38), does not suggest otherwise. That Section does not even refer to carrier facilities or equipment; nor does it purport to give the Commission any sort of prior approval power over terminal equipment.

[19] Carrier registration in fact will not equalize the competitive position of carriers with non-carriers (who already enjoy major advantages) but will only increase the delay and red tape for all registrations. Pet. 29 n.48.

"enjoy" a "competitive advantage" over non-carrier equipment suppliers. ARINC Br. 17.[20] Intervenors further admit that *RCA* and *Hawaiian Telephone* established that the FCC "'is not free to create competition for competition's sake.'" ARINC Br. 18. Rather, the public interest must be the FCC's guiding standard, and where the Commission acts for the sake of competition, it must determine that such action would advance the public interest. *FCC* v. *RCA Communications, Inc., supra,* 346 U.S. at 96-97.

What intervenors do claim is that the FCC made the necessary public interest determination in requiring carrier registration to eliminate any "competitive advantage." However, to support this assertion, intervenors cite only a single paragraph of the FCC's *Second Report and Order* dealing solely with the FCC's determination that the public interest would be served by liberalizing the terms on which *customers* could supply and connect their own equipment to the telephone network. Pet. App. 9c, *cited in* ARINC Br. 19 n.50. The paragraph does not even mention, much less examine, the separate issue raised here whether the public interest would benefit by handicapping carriers simply to adjust or influence the competitive position of carriers and non-carriers in the market; nor is this public interest addressed anywhere else in the Commission's registration orders.[21]

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[20] The intervenors' words are essentially those of the FCC which specifically indicated it was requiring carrier registration to deny carriers "any competitive advantage." Pet. App. 15b-16b.

[21] In fact, even assuming that the competitive position of manufacturers was enhanced by delaying new telephone company equipment, it is impossible to see how the public would be served by delaying its access to new equipment or imposing on it the multi-

Thus, despite what intervenors say, once again the Commission clearly "has been thinking about competition . . . with the objective of equalizing competition among *competitors*" (*Hawaiian Telephone Co.* v. *FCC*, *supra*, 498 F.2d at 775 (emphasis in original)), without regard to the public interest as both *RCA* and *Hawaiian Telephone* require. What is more, the FCC's other stated reasons for requiring carrier registration do not eliminate the need for review. Intervenors have brought forward nothing to dispel the conclusion that the FCC's other reasons were mere makeweights (Pet. 30 & n.44)." In any case, it is impossible to conclude that the Commission's impermissible fixation on competition, without regard to the public interest, has "not . . . infected [its] entire decision" to require carrier registration. *Dietrich* v. *Tarleton*, 473 F.2d 177, 179 (D.C. Cir. 1972).

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million dollar costs of carrier registration. Yet, these are the effects that carrier registration will have. Pet. 27-28 & 29 n.48.

" Disregarding the FCC's admission that the carriers have both the "desire and ability" to protect their network against harm from their own equipment (Pet. App. 15b), intervenors suggest that carrier equipment " 'possesses the same *potential* for harm' " as does customer equipment because the carriers purchase much of their equipment from independent manufacturers that market the same equipment to the general public. ARINC Br. 16 & n.40 (emphasis in original). By virtue of their "desire and ability," however, the carriers, unlike individual purchasers, have both the expertise and experience to acquire only equipment which is compatible with their systems and properly manufactured; and the carriers install and maintain their equipment with the same expertise and experience, while customers may not.

III. The FCC Has Clearly Failed to Consider the Economic Impact on the Public and the Court Below Plainly Violated Chenery by Substituting Its Own Economic Analysis.

1. In seeking certiorari, petitioners showed that, in considering the registration program, the FCC had before it substantial evidence indicating that its program will increase telephone rates paid by the public by a half *billion* dollars or more *annually* within the next ten years.[11] This evidence included not only detailed economic studies by carriers but a full investigative report by NARUC itself. Pet. 32. Neverthless, the FCC expressly refused (see p. 19, below) to consider the economic impact of its registration program on the public in clear violation of its obligation to consider all factors "pertinent" to the public interest. *Permian Basin Area Rate Cases,* 390 U.S. 747, 792 (1968).

Initially, intervenors seek to excuse the FCC's action by suggesting that the full implications of customer substitution of terminal equipment were examined and resolved by the Commission in its *Carterfone* decision.[12] ARINC Br. 20. But that decision was concerned only with a device for connecting private mobile radio systems to the telephone system. 13 F.C.C.2d at 420-21. The FCC itself has emphasized that *Carterfone* did "*not* hold that a customer may *substitute* his own equipment or facilities . . . for that furnished by the telephone company . . . ."[13] And the FCC specifically

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[11] NARUC, *Report After Investigation* 19 (1974), *cited in* Pet. 10.

[12] *Carterfone,* 13 F.C.C.2d 420, *recon. denied,* 14 F.C.C.2d 571 (1968).

[13] *AT&T "Foreign Attachment" Tariff Revisions,* 15 F.C.C.2d 605, 609-10 (1968), *recon. denied,* 18 F.C.C.2d 871 (1969) (emphasis added).

stated in *Carterfone* that it had "no occasion to address" any issue of economic impact as a result of the interconnection of customer equipment. 14 F.C.C.2d at 573.

In the registration docket, the FCC initially recognized the narrow limits of its action in *Carterfone*. Thus, in a supplemental notice released in April 1973, the FCC stated that the economic issues raised by the proposal for unrestricted customer substitution would be "cover[ed] . . . by further supplemental notices in the near future."[**] 40 F.C.C.2d 315, 318 (1973). The Commission never issued these supplemental notices, but its statement makes clear that even the FCC itself did not believe—as intervenors now suggest (ARINC Br. 23)—that it was merely "act[ing] in furtherance of an existing policy" in the registration docket. As a result, the issue is not whether the Commission in promulgating the registration orders was required to "revisit and reinspect" the foundations of an existing policy (ARINC Br. 23), but rather whether the Commission in promulgating those orders *ever* laid a prior adequate foundation for its entirely new policy of unrestrained customer substitution.

2. Apparently recognizing that their reliance on *Carterfone* is untenable, the intervenors also claim that the Commission did lay an adequate foundation by "fully consider[ing]" in its registration orders "the

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[**] The FCC Chairman's 1972 letter to the state commissioners (Pet. 32) also effectively acknowledged that the economic issues posed by customer substitution had not yet been addressed by the Commission and would have to be considered in the registration docket. That letter indicated that "an in-depth study" of the "economic impact of liberalized connection" was a question "integral to a fair resolution" of the registration docket.

potential economic effects of the program" on the carriers and the public. ARINC Br. 20-23. However, the registration orders themselves directly contradict this claim. The FCC's orders expressly indicate that they are not concerned with "[e]conomic issues" but are addressed "only" and "solely" to the "technical" considerations raised by the interconnection of customer equipment. Pet. App. 14b, 7c. In view of the registration orders' plain language, the intervenors' assertion that the FCC has fulfilled its obligation to consider all "pertinent" factors is baseless;[27] exclusion of the fundamental economic issues posed by the registration program has clearly occurred.[28]

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[27] Contrary to what intervenors say (ARINC Br. 24), Section 4(j) of the Communications Act (47 U.S.C. § 154(j)) did not authorize the Commission's action. Section 4(j) empowers the FCC to resolve "subordinate questions of procedure" such as questions of intervention and the order in which applications are to be heard. *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940). The Section does not empower the Commission to alter principles of substantive law or to disregard its obligation to consider all factors "pertinent" to the public interest. *Cf. L. B. Wilson, Inc.* v. *FCC*, 170 F.2d 793, 802-03 (D.C. Cir. 1948). Similarly, intervenors' reliance (ARINC Br. 24 n.67) on *Nader* v. *FCC*, 520 F.2d 182 (D.C. Cir. 1975), and *Associated Press* v. *FCC*, 448 F.2d 1095 (D.C. Cir. 1971), is completely misplaced since both those decisions were concerned simply with the implementation of interim rate increases which were subject to accounting and refund orders pending investigation. By contrast, the registration program is irreversible (Pet. 24) and certainly the large immediate losses sustained by the public can never be recouped.

[28] Although intervenors clearly wish the situation were otherwise (ARINC Br. 22-23), petitioners have shown that, for both procedural and evidentiary reasons, the FCC's hurried initial report in Docket No. 20003 cannot cure the FCC's refusal to address the economic issues in its registration docket (Pet. 35-36). Even the majority opinion below disclaimed any reliance on the report in Docket No. 20003. Pet. App. 10a n.6.

3. Unlike the intervenors, the court below plainly recognized that the FCC had not examined the extremely serious economic issues posed by the registration program. In addition, the court acknowledged that it "would be remiss . . . if [it] permitted" the program to be implemented "without even considering [its] potential economic impact." Pet. App. 33a. Accordingly, the majority resorted to its "own analysis of the potential [economic] impact of the registration program" Pet. App. 34a-35a, 30a-32a.

Petitioners have shown that the majority's action directly conflicts with *SEC* v. *Chenery Corp.*, 318 U.S. 80, 93-94 (1943), where this Court established the basic principle that administrative "action must be measured by what the [agency] did, not by what it might have done." While the FCC clearly was required to consider the economic impact of the registration program, its orders plainly indicated it did not. The court below was, therefore, "powerless to affirm the administrative action." *SEC* v. *Chenry Corp.*, 332 U.S. 194, 196 (1947).

Unable to explain away the lower court's blatant violation of the *Chenery* doctrine, the intervenors attempt to gloss over the court's error in a brief footnote. ARINC Br. 19 n.52. However, apart from naked assertions, the intervenors' footnote points to nothing indicating that the majority below in fact upheld the FCC's program on a "basis articulated in the order[s]" of the Commission as it was required to do.[20] On the contrary, even a brief review of the portions of

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[20] *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 169 (1962).

the decision below cited by the intervenors [30] suffices to make clear that the lower court, in direct violation of *Chenery*, supplied its "own analysis" for economic findings the FCC was obligated to make.

Certiorari is required to assure that agencies confront and resolve the public interest issues attending proposed action and to maintain the proper and established limits of judicial review. In fact, as petitioners have shown (Pet. 34-37), the lower court's violation of the *Chenery* doctrine is so unmistakable and represents so extreme a departure "from the accepted and usual course of judicial proceedings" [31] that summary reversal is warranted to correct the lower court's action even if the other issues raised by the petition are not to be reviewed.

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[30] The intervenors refer the Court to "552 F.2d at 1053-54, 1056" which appears at Pet. App. 29a-32a, 34a-35a. An examination of those pages shows that they consist of the court's own analysis; the pages clearly do not reveal any economic impact findings made by the Commission in this case, findings which the Commission itself said it would not make (see pp. 18-19, above).

[31] Sup. Ct. R. 19(1)(b).

CONCLUSION

For the reasons stated above and in the petition, certiorari should be granted or, alternatively, the decision below should be summarily reversed on the third issue presented in the petition.

Respectfully submitted,

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